1969

Glenwood Irrigation Company, A Corporation v. John R. Meyers : Appellant's Brief

Utah Supreme Court

Olsen and Chamberlain; Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

GLENWOOD IRRIGATION COMPANY, a corporation,
Plaintiff and Respondent,

— vs. —

JOHN R. MYERS,
Defendant and Appellant.

No.

APPELLANT'S BRIEF

Appeal From the Summary Judgment of the Sixth District Court for [illegible]
Hon. Ferdinand Erickson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

GLENWOOD IRRIGATION COMPANY, a corporation,
Plaintiff and Respondent,

— vs. —

JOHN R. MYERS,
Defendant and Appellant.

Case No. 11524

APPELLANT'S BRIEF

THE NATURE OF THE CASE

Plaintiff irrigation company brought this action to have the Court determine that the Defendant has no right or interest in and to any water of the Plaintiff company other than as a stockholder thereof, and that the right of the Defendant to divert all of the water of Glenwood Creek for a non-consumptive power site on the water system of the company is invalid.

DISPOSITION IN THE LOWER COURT

The Plaintiff's Motion for Summary Judgment, dated June 4, 1968 (R. 18) was granted in Plaintiff's favor by the Summary Judgment and Injunction dated Octo-

ber 8, 1968 (R. 25 & 26). The Court thereafter made and entered its Order Affirming Judgment and Denying All Applications for Review (R. 36).

RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the Court's Summary Judgment and Injunction (R. 25 & 26) and Order Affirming Judgment and Denying All Applications for Review (R. 36) and a remitittur to the lower Court directing it to enter an Order denying Plaintiff's Motion for Summary Judgment.

STATEMENT OF THE FACTS

Plaintiff is a mutual irrigation company distributing the waters of Glenwood Creek to its stockholders, among whom the Defendant is one. In addition to his rights as a stockholder, the Defendant is the owner by mense conveyance of the land whereon the right was originally created (R 11-A) in the official adjudication of the Sevier River System, commonly known as the "Cox Decree" *Richlands Irrigation Company,* a corporation, Plaintiff, vs. *West View Irrigation Company,* a corporation, et al, Defendants, Civil Case No. 843, Millard County, Utah, of a non-consumptive right to divert the entire stream of Glenwood Creek for power purposes, as set forth at page 57 thereof, as follows:

> "CHRISTINE R. CHRISTENSEN
> Priority: 1880. Power. Amount: Entire Stream. Claim No. 406½. Diversion No. 420. Period of Use: From January 1st to December 31st. Point

> of Diversion: From Glenwood Springs into Glenwood ditch and used for developing power for flour milling purposes at the Glenwood Roller Mill. Said waters to be returned undiminished in quantity to the natural channel at a point about 100 feet down stream from the mill."

On the 14th day of August, 1967, after proceedings conducted before the Utah State Engineer, the said Utah State Engineer approved the Application of the Defendant for extension of time to August 14, 1968, within which to complete his resumption of usage of the said water right (R. 10). The said Utah State Engineer's Decision was not appealed from by the Plaintiff, who was a protestant in said proceedings, and who had notice of the said Decision (R.-10).

Plaintiff's Complaint alleges that the non-consumptive power right of the Defendant "had been forfeited by long periods of non-use," (R.-21). No testimony or evidence as such was ever received by the Court, going to this point, except for the documents and matters attached to the Plaintiff's Motion for Summary Judgment (R.-18). And the Court made its ultimate finding of forfeiture of Defendant's water right on the basis of the record then before the Court.

ARGUMENT

POINTS

1.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

2.

THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

3.

THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION DATED OCTOBER 16, 1968. (R.30.)

The Court in handing down its Summary Judgment and Injunction (R.-25 & 26), of neceessity was required to find, as a matter of fact, that the Defendant's non-consumptive power right was invalid by reason of forfeiture thereof by non-use. Forfeiture of a water right by non-use thereof, and the conditions for the extension of time in which to resume use of water rights, are set forth in Title 73, Chapter 1, Section 4, Utah Code Annotated, 1953; the applicable parts of which said statute are quoted as follows:

> "73-1-4. Reversion to public by abandonment or failure to use within five years — Extension of time.
>
> When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease and thereupon such water shall revert to the public, and may again be appropriated as provided in this title, unless before the expiration of said five year pe-

riod the appropriator or his successor in interest shall have filed with the State Engineer a verifiied application for an extension of time, not to exceed five years, within which to resume the use of such water and unless pursuant to said application the time within which said nonuse may continue is extended by the state engineer has hereinafter provided. The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right. The filing of such application for extension of time shall extend the time during which nonuse may continue until the order of the state engineer thereon.
* * * *

Such applications for extension shall be granted by the state engineer for periods not exceeding five years, each, upon a showing of reasonable cause for said nonuse. Financial crisis, industrial depression, operation of legal proceedings or other unavoidable cause, or the holding of a water right without use by any municipality, metropolitan water districts or other public agencies to meet the reasonable future requirements of the public shall constitute reason cause for such nonuse. * * * *"

The record in this cause illustrates that the Defendant, John R. Meyers, timely filed his Application with the Utah State Engineer for Extension of Time Within Which to Resume Use of Water (R.-14 & 15). The application was granted to December 30, 1965, by the Memorandum Decision of the Utah State Engineer (R.-16). Prior to the expiration of said time, further applications for extension of time were filed by the Defendant (R.-07 to 09) and on August 14, 1967, the Utah State Engineer, after hearings upon said applications, wherein

the Plaintiff appeared and protested, and after a consideration of all of the data then before the Engineer, by a Memorandum Devision (R.-10) granted the Defendant's application for extension of time, to and including August 14, 1968, with a finding that:

> "It is the opinion of this office that the applicant with the priority described above would not interfere with the water rights of the Glenwood Irrigation Company, and that the applicant has met the requirements of the Utah State Engineer and is entitled to an extension of time within which to reseume use of water."

In passing it is noted that the specific date of "August 14, 1968," while not set forth in the said Decision, is established in the endorsements of the State Engineer, as shown at R.-09.

No appeal was taken by the Plaintiff from this Memorandum Decision, as permitted by the provisions of Title 73, Chapter 3, Section 14, Utah Code Annotated, 1953. At no point in the record is any attempt made by the Plaintiff to show that the Defendant has failed to resume his use of the said water right by August 14, 1968. But the entire thrust of the Plaintiff's Motion for Summary Judgment (R.-18) and his exhibits was to attack the factual premise upon which the Utah State Engineer's Memorandum Decision was based; this by reference to some, but not all, of the data before the State Engineer and dispite Defendant's plea that the entire record of the proceedings before the Utah State Engineer should be made available to the lower Court. That such a collateral attack will not lie is an elementary rule of law. The only and exclusive manner by which a decision

of the Utah State Engineer will be reviewed is by way of appeal to the District Court (see provisions of the statute last above referred to). Unless the State Engineer's ruling is reversed on appeal it becomes and is final and controlling.

Smith vs. *Sanders*
112 Utah 517
189 P.2d 701

Hanson vs. *Salt Lake City (Utah)*
205 P.2d 255

It is the position of the Defendant that the lower Court was without jurisdiction to examine into any matters concerning the Defendant's alleged failure to resume the use of his water right prior to August 14, 1968, as that issue was settled by the Utah State Engineer's Memorandum Decision of August 14, 1967 (R.-10). Only evidentiary matters going to a non-resumption of the use of said water right after August 14, 1968, could properly be considered by the lower Court on Plaintiff's Motion for Summary Judgment. *The record is silent as to any such evidence from the Plaintiff.* In fact, the *only* evidence in the record on this point is the letter from the Utah State Engineer dated August 9, 1968, (R-21) placed in evidence in this cause by the Defendant in resistance of the Plaintiff's Motion for Summary Judgment. This letter conclusively establishes that the Defendant had in fact resumed his use of the said water within the time required by law. We quote from the letter:

"* * * *

The proof of resumption of use of water covering the Application for Extension No. 138 has been

field examined and reviewed by this office. The description of the resumed use has been found to be correct, and the proof is hereby accepted as evidence that the use of water under the original right has been resumed.

Yours truly,
/s/ HUBERT C. LAMBERT
Hubert C. Lambert
State Engineer''

The lower Court has seized upon a forfeiture of Defendant's water right, without any scentella of admissible evidence thereof. This is not due process of law. Whether or not Mr. Meyers had forfeited his water right to the State of Utah was, under the state of the record in this cause, a matter of disputed fact; even if the situation were to be viewed in a light most favorable to the Plaintiff, rather than to the Defendant. In such a situation the harsh remedy of Summary Judgment will not lie and the parties are put to their proof upon a trial of the issues.

In re Williams Estates
10 Utah 2d 83
348 P.2d 683

Young vs. *Felornia*
121 Utah 646
244 P.2d 862

The lower Court seemingly sought to justify its granting of Summary Judgment on the basis of the rulings of the Utah Supreme Court in the cases of *Fred Baugh et ux,* vs. *Wayne D. Criddle, State Engineer, et al,* 19 Utah 2d 361, 431 P.2d 790 and *Mosby Irrigation Company* vs. *Criddle,* 11 Utah 2d 41, 354 P.2d 84.8. But these

cases are clearly distinguishable from the case at bar for the reason that in both the *Baugh* (supra) and *Mosby Irrigation Co.* (supra) cases the factual matters relating to the alleged forfeiture were properly before the Court, and the Court could there make a legal determination on the issue of forfeiture. Such is not the state of the record in the instant case, where the only evidence properly before the Court relating to forfeiture (the State Engineer's letter) (R-21) would rather conclusively show that the application to resume use of the water for power purposes had in fact *not* lapsed.

Defendant asserts that the Summary Judgment of the Plaintiff above referred to was not supported by the evidence, admissions and inferences which, when viewed in the light most favorable to the Defendant, showed that "there is no genuine issue as to any material fact" (the fact of whether or not the right of the Defendant had been lost by non-user after August 14, 1968) "and that the moving party is entitled to a judgment as a matter of law." See Rule 56(c), Utah Rules of Civil Procedure, Summary Judgment. Therefore, under the numerous decisions of the Utah Supreme Court the lower Court herein erred in granting Plaitiff's Motion for Summary Judgment, and in denying the Defendant's Motions dated October 16, 1968 (R-30).

Brandt vs. *Springville Banking Co.*
10 Utah 2d 350

Bullock vs. *Desert Dodge Truck Center, Inc.*
11 Utah 2d 1
354 P.2d 559

Tanner vs. *Utah Poultry and Farmer's Co-op*
11 Utah 2d 353
359 P.2d 18

Frederick May Company Inc. vs. *Dunn*
13 Utah 2d 40
368 P.2d 266

CONCLUSION

The ultimate position of the Defendant is well stated in the legal text, Federal Practice and Procedure, Barron and Hoitzoff, Vol. 3, Section 1234, (interpreting the Federal rule, [Rule 56], Federal Rules of Civil Procedure) which is identical with the Utah rule, wherein the tax writers state the rule of authority to be as follows:

> "The question to be decided on a Motion for Summary Judgment is whether there is a genuine issue of fact, and not how that issue should be determined. The hearing on the motion is not a trial. If it appears that there is a genuine issue to be tried, the motion is denied and the case allowed to proceed to trial in the usual way. A Summary Judgment should not be granted unless the truth is clear and the moving party is entitled to judgment beyond all doubt. If the Court has a reasonable doubt, summary judgment will be denied. A substantial dispute as to a material fact forecloses Summary Judgment."

On the state of the record in this case, was the lower Court in a position to determine the issue of forfeiture of Defendant's water right? Defendant respectfully contends that this qustion can only be answered in the negative. The lower Court has erred in that it has determined a disputed issue of fact sans trial and the taking

of necessary testimony and the receipt of all evidence bearing on the issue. Justice and fair dealing requires that the Summary Judgment of the lower Court be reversed and that the respective parties to this litigation be put upon their respective proofs at the trial thereof.

Respectfully submitted,

JOHN T. VERNIEU
Attorney for Appellant